Wan Mohd Sofian bin Wan Md Saad v MBf Finance Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-824 OF 1998
KAMALANATHAN RATNAM J
7 OCTOBER 1999

Civil Procedure *— Appearance — Late appearance — Appearance entered after eight day period — Judgment entered for unliquidated damages — No notice given to other solicitor — Whether judgment properly obtained — Rules of the High Court 1980 O 13 r 2 — Legal Profession (Practice and Etiquette) Rules 1978 r 56*

The plaintiff brought an action against the defendant and claimed for general damages amounting to RM1m. The defendant admitted that the writ of summons and the statement of claim was served on its firm of solicitors on 9 February 1999. The defendant's memorandum of appearance was dated 19 February 1999 and filed in court on the same day but was served on the plaintiff on 18 February 1999. On the facts, the eight day period to enter appearance expired on 18 February 1999. The plaintiff applied to set aside the memorandum of appearance and for the judgment of RM1m to be entered as general damages which the senior assistant registrar ('the SAR') allowed. The defendant appealed against the decision of the SAR and also filed a separate application to set aside order of the SAR.

Held, allowing the appeal with costs:

(1) A defendant was only precluded from entering appearance after judgment had been entered unless he had the leave of the court. The only effect upon a defendant who entered appearance late was that he could not, without the consent of the court, serve a defence or do anything else any later than as if he had entered appearance within time. Therefore, the defendant was perfectly entitled to enter the late appearance since judgment had not as yet been taken on that date (see p 323C–E).

(2) The quantification of a claim for unliquidated damages amounting to RM1m by the plaintiff or his legal adviser did not entitle the plaintiff to be given the liberty to enter judgment for that amount. Pursuant to O 13 r 2 of the Rules of the High Court 1980 ('the RHC'), the plaintiff ought to have immediately upon the expiration of the time fixed for entering of appearance, obtained interlocutory judgment against the defendant and sought another date to assess damages because a party who might not wish to contest liability might most certainly want to contest the award of damages (see p 323E–H).

(3) The plaintiff should have applied to set aside the service of the filing of the memorandum of appearance instead of the service of the memorandum of appearance which he had no right to do and the order granted by the SAR was against the existing rules.

Further, in obtaining the judgment against the defendant, the plaintiff did not give the notice required by r 56 Legal Profession (Practice and Etiquette) Rules 1978 (see pp 323H–324A, D–E). A

(4) The orders and judgments made or entered by a court, in private litigation, in the exercise of its coercive power upon the default of a party to a suit, even when made or entered in breach of a rule of court or of practice, were merely irregular and not nullities. Any proceedings commenced, or any order or judgment obtained, in breach of a rule of court was always subjected to the curative power of the court available under O 2 r 1 of the RHC (see p 324G–H); *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 followed. B C

[Bahasa Malaysia summary

Plaintif telah memulakan tindakan terhadap defendan dan menuntut ganti rugi am berjumlah RM1j. Defendan telah mengakui bahawa writ saman dan pernyataan tuntutan telah diserahkan ke atas firma peguamnya pada 9 Februari 1999. Memorandum kehadiran defendan bertarikh 19 Februari 1999 telah difailkan di mahkamah pada hari yang sama tetapi telah diserahkan ke atas plaintif pada 18 Februari 1999. Berdasarkan fakta-fakta, tempoh lapan hari untuk memasuki kehadiran telah luput pada 18 Februari 1999. Plaintif telah memohon untuk mengetepikan memorandum kehadiran tersebut dan agar penghakiman terhadap RM1j tersebut dimasuki sebagai ganti rugi am yang telah dibenarkan oleh penolong kanan pendaftar ('PKP'). Defendan telah membuat rayuan terhadap keputusan PKP dan juga telah menfailkan satu permohonan berasingan untuk mengetepikan perintah PKP tersebut. D E F

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Seorang defendan hanya dihalang daripada memasuki kehadiran setelah penghakiman dimasuki kecuali jika beliau memperoleh kebenaran mahkamah. Satu-satunya akibat ke atas seorang defendan yang telah memasuki kehadiran lewat adalah bahawa beliau tidak boleh, tanpa kebenaran mahkamah, menyerahkan satu pembelaan atau berbuat apa-apa yang lain lebih lewat daripada tempoh seperti mana jika beliau telah memasuki kehadiran di dalam tempoh masa. Oleh demikian, defendan sememangnya berhak untuk memasuki kehadiran lewat memandangkan penghakiman masih belum lagi diambil pada tarikh tersebut (lihat ms 323C–E). G H

(2) Pengataan kuantiti suatu tuntutan untuk ganti rugi jumlah tak tentu berjumlah RM1j oleh plaintif atau penasihat undang-undang beliau tidak melayakkan plaintif diberikan kebebasan untuk memasuki penghakiman bagi jumlah tersebut. Menurut A 13 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') I

plaintif sepatutnya telah sejurus selepas peluputan tempoh masa yang ditetapkan untuk memasuki kehadiran, memperoleh penghakiman interlokutori terhadap defendan dan memohon satu tarikh lain bagi menaksirkan ganti rugi kerana satu pihak yang mungkin tidak berhasrat untuk mempertikaikan liabiliti mungkin sekali ingin untuk mempertikaikan award ganti rugi tersebut (lihat ms 323E–H).

(3) Plaintif sepatutnya memohon untuk mengetepikan serahan pemfailan memorandum kehadiran tersebut dan bukan serahan memorandum kehadiran tersebut yang beliau tiada hak untuk berbuat demikian dan perintah yang diberikan oleh PKP yang bertentangan dengan kaedah-kaedah yang wujud. Tambahan pula, di dalam memperolehi penghakiman terhadap defendan, plaintif tidak memberikan notis seperti mana yang dihendaki oleh k 56 Kaedah-Kaedah (Amalan dan Etika) Profesyen Undang-Undang 1978 (lihat ms 323H–324A, D–E).

(4) Perintah-perintah dan penghakiman-penghakiman yang dibuat atau dimasuki oleh mahkamah, di dalam litigasi persendirian, di dalam menggunakan kuasa memaksanya apabila berlaku keingkaran satu pihak di dalam guaman, walaupun dibuat atau dimasuki dengan melanggar suatu kaedah mahkamah atau amalan, adalah hanya di luar aturan dan bukanlah pembatalan-pembatalan. Apa-apa prosiding yang dimulakan, atau apa-apa perintah atau penghakiman yang telah diperolehi, melalui pelanggaran suatu kaedah mahkamah adalah sentiasa dijadikan subjek sebagai kuasa kuratif mahkamah yang wujud di bawah A 21 KMT (lihat ms 324G–H); *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 diikut.]

Notes

For cases on late appearance, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 976–977.

Cases referred to

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (folld)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 r 56
Rules of the High Court 1980 O 2 r 1, O 3 r 2, O 12 rr 4, 5, O 13 r 2

Loh Siew Cheang (*Chua Eng Siong* with him) (*Cheang & Ariff*) for the appellant/defendant.

V Rajadevan (*Rajadevan & Assoc*) for the respondent/plaintiff.

Cur Adv Vult A

Kamalanathan Ratnam J:

Facts

The plaintiff commenced this action against the defendant claiming general damages amounting to RM1m, interests, exemplary and additional damages, and costs for alleged negligence on the part of the defendant in issuing/executing/attempting to execute a warrant of arrest under a judgment debtor summons in respect of Kuala Lumpur Magistrate Court Case No J76–2840 of 1996 and also for defamation. The writ of summons with the statement of claim was filed on 22 December 1998. There is no affidavit of service filed by the plaintiff. However, the defendant has magnanimously admitted that the same was served on its firm of solicitors at their request on 9 February 1999. The defendant's memorandum of appearance was dated 19 February 1999 and was also filed on the same day. However, by a letter dated 19 February 1999 the defendant had in fact served the plaintiff with a copy of the memorandum of appearance on 18 February 1999. In other words, a copy was served even before it was filed on 19 February 1999. Subsequently, the defendant filed and served its defence on 3 March 1999. B C D

In the meantime on 1 March 1999, the plaintiff filed an application to set aside the memorandum of appearance dated 19 February 1999 and to obtain judgment for the sum of RM1m which the plaintiff had purely in its pleadings assessed, as its loss by way of general damages. E

The learned senior assistant registrar ('SAR') after hearing arguments set aside the memorandum of appearance and gave the plaintiff liberty to enter judgment for the sum of RM1m as general damages with costs, on 5 July 1999. The defendant thus appealed against that decision. In the meantime ex abdundante cautaela the defendant also applied to set aside the order of the SAR dated 5 July 1999. As to whether the defendant can proceed by way of this dual pronged approach is not my concern since both parties did not address me on this issue. Instead, they have asked that I take both enclosures, namely, encl 10 (this appeal) and encl 12 (the application to set aside the judgment) together. I propose to deal with the appeal which should therefore put to rest encl 12. F G

The appeal

The writ and statement of claim was served on the defendant on 9 February 1999. Pursuant to O 12 r 4 of the Rules of the High Court 1980 ('the RHC') the time limited for entering an appearance within the jurisdiction is eight days and pursuant to O 3 r 2 the eight days begin to run from 10 February 1999. Therefore, the last day for entering appearance was 18 February 1999. Since 16 February 1999 and 17 February 1999 were public holidays and since the 18th was a working day, the public holidays would therefore have no effect in extending the period for entering appearance. Whilst it is admitted that the defendant only entered H I

A appearance by filing with the registry, on 19 February 1999, he had served a copy on 18 February 1999. I shall first deal with the issue of filing the memorandum of appearance late.

Whilst the defendant had by its own admission entered appearance a day late, there is no provision in the RHC that disallows a defendant from B doing so. The rule governing late entering of appearance is O 12 r 5 which reads as follows:

> (1) A defendant may not enter an appearance in an action after judgment has been entered therein except with the leave of the Court.
>
> (2) Except as provided by paragraph (1), nothing in these rules or any writ or order thereunder shall be construed as precluding a defendant from C entering an appearance in an action after the time limited for appearing, but if a defendant enters an appearance after that time, he shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other thing later than if he had appeared within that time.

Therefore it is clear that a defendant is only precluded from entering D appearance after judgment has been entered unless he has the leave of the court. But in this case, the plaintiff failed to act with promptitude. The only effect upon a defendant who enters appearance late is that he cannot, without the consent of the court, serve a defence or do anything else any later than as if he had entered appearance within time. Therefore, it is my judgment that the defendant was perfectly entitled to enter the late E appearance since judgment had not as yet been taken on that date.

Plaintiff's failure to act promptly

This is clearly a claim for unliquidated damages. Merely by quantifying a claim for damages which in the opinion of the plaintiff or his legal adviser F amounted to a figure of RM1m did not by any stretch of the imagination entitle the plaintiff to be given the liberty to enter judgment for that amount. The right of the plaintiff in respect of his unliquidated claim for damages although fixed by him is governed by O 13 r 2 of the RHC which reads as follows:

G > Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

H Therefore, the plaintiff ought to have immediately upon the expiration of the time fixed for entering of appearance, obtained interlocutory judgment against the defendant and sought another date to assess damages. The rationale is simple. A party might not wish to contest liability but would most certainly want to contest the award of damages.

But in this case, what the plaintiff did was to apply to set aside the filing I of the appearance not the service thereof. This is confirmed by the plaintiff in his submission. This the plaintiff had no right to do. Whilst the plaintiff had in his affidavit in support of his application to set aside the filing of the

memorandum of appearance, stated that the said memorandum of appearance was served on him on 18 February 1999, his application in no way contended that he was seeking to set aside the service and not the filing of the memorandum of appearance. The order granted by the SAR was against the existing rules.

There is another issue the plaintiff will have to face. Rule 56 of the Legal Profession (Practice and Etiquette) Rules 1978 reads as follows:

> Judgment by default
>
> Where the name of the advocate and solicitor or his firm appears on the Court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter Judgment by Default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and seven days shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

Clearly, the plaintiff ought to have given the defendant such notice. There is no evidence before me of any such notice being given at all. The legal profession in Malaysia is governed by the Legal Profession (Practice and Etiquette) Rules 1978 and the Legal Profession Act 1976 ('the Act'). Various subsidiary legislation in the form of rules have been gazetted under the rules-making powers contained in the said Act. The object of these rules is to ensure that advocates and solicitors conduct their affairs in an honourable and fair manner befitting the practice of law. Therefore, in an application to set aside a judgment obtained in breach of any of the said rules or the provisions of the Act, the court ought to consider such a breach.

There is no purpose in considering the other issues raised by the plaintiff with respect to irregularities in the light of the clear pronouncement of the Federal Court in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC) wherein the court held that orders and judgments made or entered by a court, in private litigation, in the exercise of its coercive power upon the default of a party to a suit, even when made or entered in breach of a rule of court or of practice, are merely irregular. They are not nullities. Any proceedings commenced, or any order or judgment obtained, in breach of a rule of court is always subject to the curative power of the court available under O 2 r 1 of the RHC.

The appeal is allowed with costs.

Appealed allowed with costs.

Reported by Chin En Tek